IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OKLAHOMA

State of Oklahoma, Plaintiff, vs. Tyson Foods, Inc., et al., Defendants.	)	**Case No. 4:05-cv-00329-GKF-PJC**

DEFENDANTS CARGILL, INC. AND CARGILL TURKEY PRODUCTION, LLC'S REPLY MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs' response to the Cargill Defendants' summary judgment motion emphasizes their penchant to condemn the entire "poultry industry" rather than to prove the individual claims they assert against Cargill and CTP. Plaintiffs disregard their burden to show that land-applied turkey litter *actually* ran off a Cargill-related field and *actually* entered the waters of the IRW. Most tellingly, Plaintiffs wholly ignore Dr. Andy Davis's thorough and individual analysis of *every* Cargill Grower location and his conclusion that Plaintiffs' data *cannot* establish a causal link between *any* of these fields and *any* purported downstream effect on water quality. (Dkt. No. 2092-4). The Court should grant summary judgment.

RESPONSE TO "DISPUTED MATERIAL FACTS" AND "ADDITIONAL FACTS"

Plaintiffs' lengthy factual recitation (Dkt. No. 2178 at 1-9) does not create genuine issues of material fact for several reasons: most of the facts do not involve the Cargill Defendants, many of the purported "facts" that do address Cargill or CTP are unsupported by the cited sources, and those that are supported by Plaintiffs' sources are not material to the present motion.

The great majority of the facts recited in Plaintiffs' response do not concern either Cargill or CTP, but instead make vague general statements about the "poultry industry" as a whole. For example, at least 37 of the exhibits cited in Plaintiffs' fact section do not mention Cargill at all.

Moreover, a number of Plaintiffs' purported "facts" that *are* Cargill-specific are untrue, incomplete, or misleading. For example, Plaintiffs claim that "[t]he Cargill Defendants' contracts with the growers are generally non-negotiable" (Dkt. 2178 at 2), citing "Dkt. #2066-5 (Maupin Dep., p. 21)." In fact, Mr. Maupin's testimony clearly referred to his *former* employer Virginia-based Rocco Enterprises, and *not* to the practice at CTP. (Dkt. No. 2066-5 at 3.)

Plaintiffs also assert that "ODAFF has found at least one Cargill grower to be in violation of the Oklahoma Registered Poultry Feeding Operations Act laws and rules" and that "ODAFF

has also generated a database that shows several Cargill grower violations noted during inspections." (Dkt. No. 2078 at 3.) Plaintiffs fail to mention, however, that *not one of these situations* involved the misapplication of turkey litter in violation of state law; they are all related to what ODAFF's Tina Gunter refers to as "technical violations" (e.g., failure to provide a soil test). (Dkt. No. 2079-20 at 113:18-114:18; 2079-14 at n.14.) These situations—none of which resulted in ODAFF fines or violation points (Dkt. No. 2079-14 at ¶ 7; 2079-15)—do not support the claim of runoff underlying Plaintiffs' statutory claims. (See Dkt. No. 1215 ¶¶ 128-130, 133-134 (alleging defendants violated statutes by causing runoff).)[1]

The length of this reply does not permit dissection of all of the false or misleading citations in Plaintiffs' response, [2] but the Cargill Defendants urge the Court to consult the original cited source prior to any dispositive reliance on Plaintiffs' characterization of a particular fact.

Finally, the scattered facts Plaintiffs cite that *do* address the Cargill Defendants that *are* accurate are not material to the Cargill motion. As detailed below as to particular claims,

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[1] Plaintiffs also assert that "Cargill's own 'Flock Evaluation' documents show that Cargill itself has discovered what amount to violations of Oklahoma law." Dkt. No. 2078 at 3; 2178-6 (filed under seal). Plaintiffs fail to inform the Court, however, that *every* operation identified in the exhibit *is actually located in Arkansas*. See Dkt. Nos. 2200-8 and 2200-9 (filed under seal). Plaintiffs also cite no evidence showing that any runoff occurred at any such locations.

[2] Other examples of incomplete and misleading citations include Dr. Fisher's cherry-picked STP data, which includes many STP test results for fields without any evidence that litter has been applied to them. For example, nothing suggests that litter was applied on any field associated with Mr. Doyle that are included in Dr. Fisher's data. See, e.g., Dkt. No. 1552-7 ¶ 7(Doyle Aff.).

Plaintiffs also assert that "extremely high STP levels on another Cargill grower's fields in the IRW" (Dkt. No. 2178 at 4), but fail to mention (despite discussing the issue at the grower's deposition) that the high level resulted from a "bad test" and that earlier and later tests of the same field showed significantly lower STP values. See Ex. A: Schwabe Soil Tests; Dkt. No. 2079-6, at 118:21-122:8 (Schwabe Aff.).

Plaintiffs have presented a small flurry of assertions that the Cargill Defendants do indeed dispute, but those assertions have no bearing on the specific legal issues raised by Cargill motion. Either the fact relates to an element not at issue here (e.g., whether the presence of an AWMP assures compliance with regulations), or the fact is so nonspecific and vague as to be meaningless to the focused motion (e.g., the number of Cargill-related birds or houses in the IRW), or the "fact" is really a tangential expert opinion invoking pejorative language (e.g., Cargill has "oligopsony power"). In any event, as set forth below, none of the facts legitimately disputed by Plaintiffs is material to the present motion or justifies its denial.

ARGUMENT

I. The Cargill Defendants Are Entitled to Summary Judgment Based on a Lack of Evidence That Attributes Any Runoff of Turkey Litter to the Cargill Defendants or their Cargill Contract Growers (Counts 1, 2, 3, 4, 5, 6, 7, and 8).

A. Plaintiffs Have Produced No Expert or Other Evidence of Any Runoff or Other Escape of Turkey litter Constituents from Any Cargill-Related Field.

Plaintiffs correctly note that the causation elements of their various claims may be proved by circumstantial as well as direct evidence.[3] The remainder of Plaintiffs' causation discussion, however, confuses the issue of direct versus circumstantial evidence with the requirements of general and specific causation. To defeat summary judgment, Plaintiffs must establish *both* that land-applied turkey litter *is capable* of reaching and injuring state waters (general causation) *and* that some land-applied turkey litter from some Cargill-related field *actually* reached and injured

[3] Plaintiffs have objected to Cargill's reliance on several expert reports that are not sworn. (See Dkt. No. 2178 at 9, n.2.) Affidavits verifying these reports have now been submitted, curing any defect. (See Dkt. Nos. Davis - 2187-9 (Davis); 2190-6 (Murphy); 2237-4 (Clay); Ex. B: Ginn Declaration. See Maytag Corp. v. Electrolux Home Prods., 448 F. Supp. 2d 1034, 1064 (N.D. Iowa 2006) (holding expert's affidavit or deposition testimony verifying previously unsworn report permits court to consider report under Rule 56(e)).

the waters of the IRW (specific causation). See Goebel v. Denver and Rio Grande Western R. Co., 346 F.3d 987, 990 (10th Cir. 2003). Plaintiffs' response here does not even try to meet the second requirement of specific causation.

The Cargill Defendants do not contend (as Plaintiffs suggest) that direct evidence was the *only* way Plaintiffs could demonstrate causation. Plaintiffs' causation problem is that they have identified no evidence—direct *or* circumstantial—showing that *any* turkey litter from *any* Cargill-related field has *actually* run off into *any* waters of the IRW. Thus, regardless of whether Plaintiffs' have shown that such runoff is *theoretically* possible—general causation—they have *not* shown that such runoff *actually* occurred—the crucial *specific* causation element.

Of the ten points in the "State's Summary of Cargill Causation Evidence" (many unsupported by the cited sources), nine of them (Nos. 1-5 and 7-10) offer no arguable support for a finding of specific causation. Each of these points addresses general causation issues such as the amount and location of land application of litter, the geology of the IRW, and the general contribution of poultry litter to phosphorus and bacteria in the IRW. Even assuming *arguendo* that these points suggest a theoretical possibility that turkey litter or some component *could* run off from some Cargill-related field, *none* of them supports an inference that such runoff *actually* occurred from any *particular* Cargill-related field, or indeed *from any Cargill-related field at all*.

Only Plaintiffs' point number 6—"scientific evidence showing that some portion of land-applied poultry waste is *always* transported from fields to waters"—even indirectly implies that runoff actually occurred from any Cargill field. Plaintiffs presumably would have the Court infer that if such transport "always" happens to land-applied poultry litter, it must happen to turkey litter land-applied on Cargill-related fields. Even this strained extrapolation of Point 6, however, fails to support Plaintiffs' claims against the Cargill Defendants for several reasons.

Plaintiffs' "always" assertion in Point 6 relies entirely on a sentence from the deposition of Dr. Chaubey, whom Plaintiffs deposed earlier this year.[4] Even putting aside the issue of whether Plaintiffs may rely on the likely-inadmissible testimony of this undisclosed expert,[5] Plaintiffs' reliance on this passage from his testimony is misplaced.

First, Plaintiffs seriously mischaracterize the words Dr. Chaubey actually said. He did *not* say, as Plaintiffs represent, that "some portion of land-applied poultry waste is *always* transported from fields to waters." Dkt No. 2178 at 10 (citing Fact ¶ 9, emphasis in original). He said: "So generally speaking the amount of – there will always be some losses taking place from the areas treating with -- treated with the poultry waste." (Dkt. No. 2088-11 at 4.) He does not state *what* is lost, *how* that loss takes place, or *where* the lost material goes. Notably, he does not even *mention* water.

Moreover, Plaintiffs' quotation from Dr. Chaubey addresses poultry litter only generally, and Plaintiffs make no attempt to address differences among any of the myriad different types of poultry (e.g., layers, broilers, turkeys, etc.). This omission is crucial; in the very next sentence after the passage Plaintiffs quote, Dr. Chaubey makes clear his view that land-applied poultry litter from different "bird types" may behave differently. See Ex. C: Chaubey Dep. at 165:14-166:11.

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[4] Plaintiffs' entire "State's Summary" cites only to their Fact ¶ 9 (Dkt. No. 2178 at 10-11), and Dr. Chaubey is the only expert Plaintiffs quote in paragraph 9 as using the word "always."

[5] Plaintiffs provided no expert disclosure for Dr. Chaubey as required by Rule 26(a)(2)(B), despite the fact that they "specially employed" him to provide expert testimony to support their case. See Black's Law Dictionary at 543 (7th ed. 1999) (defining "employ" as "to make use of"). Moreover, even if he were not a "specially employed" expert, Rule 26(a)(2)(A) nevertheless required Plaintiffs to "disclose to the other parties the identity of any witness it may use at trial to present evidence under Federal Rule of Evidence 702, 703, or 705." Plaintiffs have disclosed Dr. Chaubey *only* as a fact witness, never as an expert. See Ex. D: State's Fact Witness List.

Finally, Plaintiffs cite the Court to (1) nothing that would qualify Dr. Chaubey as an expert on poultry litter, environmental fate and transport, or any other topic, (2) nothing to suggest that his opinion on these scientific issues would be admissible at trial, and therefore (3) nothing that Plaintiffs can use to defeat summary judgment. See Fed. R. Civ. P. 56(e)(1) (affidavit opposing summary judgment must "set out facts that would be admissible in evidence, and show that the affiant is competent to testify on the matters stated"). Notably, Plaintiffs offer nothing from any of their many *paid* experts to suggest that runoff "always" occurs.

In sum, neither Dr. Chaubey's deposition nor the other points in the "State's Summary" creates a genuine issue of material fact on the issue of specific causation as to Cargill or CTP. Simply noting Cargill-related farms land-apply turkey litter and claiming that poultry litter contaminates the IRW is not enough. See New Jersey Turnpike Authority v. PPG Indus., Inc., 197 F.3d 96, 105 n.9 (3d Cir. 1999) ("it is not enough that [plaintiff] simply prove that each Generator Defendant produced COPR and that COPR was found at each of the sites in question and ask the trier of fact to fill in the link"). Plaintiffs cite no evidence that any poultry litter land applied to any Cargill-related field has run off into any waters of the IRW and, as Dr. Andy Davis's report attests, they have no such evidence. (Dkt. No. 2092-4).

B. Plaintiffs' Lack of Causation Evidence Entitles the Cargill Defendants to Summary Judgment on Counts 1-8.

Plaintiffs' failure to produce such evidence warrants summary judgment for the Cargill Defendants on all of Plaintiffs' claims that depend on such evidence of such runoff.

CERCLA release (Counts 1 and 2). Absent evidence of runoff of turkey litter from some Cargill-related field, Plaintiffs cannot as a matter of law establish the necessary element of a "release" of a "hazardous substance." 42 U.S.C.§ 9607(a); 42 U.S.C. § 9601(22); see, e.g., Otay Land Co. v. U.E. Ltd. LP, 440 F. Supp. 2d 1152, 1172 (S.D. Cal. 2006).

In addition, the "normal application of fertilizer" is not a "release" on which CERCLA liability may be premised. 42 U.S.C. § 9601(22). Plaintiffs' response talks generally about the exception, but never takes on the central premise of the Cargill argument: the land application of turkey litter as fertilizer, done under the authority of and in compliance with *state-drafted* NMPs or AWMPs is, by any reasonable reading of the term, a "normal application of fertilizer."

CERCLA causation. Plaintiffs' response makes no attempt to identify a causal link between any Cargill release and either the claimed natural resource damages, see 42 U.S.C. § 9607(a)(4)(C), or response costs, as required for a multiple-site case like this one. E.g., Thomas v. Fag Bearings Corp., 846 F. Supp. 1382, 1386 (W.D. Mo. 1994). Plaintiffs' response does not address the multiple-site issue, relying instead on the inapposite single-site case of Tosco Corp. v. Koch Indus., Inc., 216 F.3d 886 (10th Cir. 2000).

RCRA. Absent evidence of the runoff of turkey litter from some Cargill-related field, Plaintiffs cannot as a matter of law establish the necessary element of a "contribution" to any conduct that may "present an imminent and substantial endangerment." 42 U.S.C. § 6972(a)(1)(B). See ABB Indus. Sys. v. Prime Tech., 120 F.3d 351, 359 (2d Cir. 1997).

Nuisance and Trespass. Absent evidence of runoff of turkey litter from some Cargill-related field, Plaintiffs cannot as a matter of law establish the element of causation for their nuisance and trespass claims. See Moore v. Texaco, Inc., 244 F.3d 1229, 1231-32 (10th Cir. 2001). Plaintiffs' response focuses on their claim of an "indivisible injury," but that issue has no bearing on the present motion; even assuming an injury is indivisible, a plaintiff must still show a causal contribution by a defendant in order to recover under these common law theories.

Oklahoma Statutory Claims. Plaintiffs' response offers no substantive response on the Cargill motion as to their statutory claims, and instead simply recites the statutes and asserts the

conclusion that they have created a genuine issue of material fact. (See Dkt. No. 2178 at 18-19. Absent evidence of either runoff of turkey litter from some Cargill-related field or the placement of turkey litter from some Cargill-related field in a location likely to cause pollution, however, Plaintiffs cannot establish either an OEQA or an ORPFOA violation. Plaintiffs also do not even try to meet the *quantitative* requirement of the OEQA. See 27A Okla. Stat. § 1-1-201(10).

In sum, although Plaintiffs seek a *separate* civil penalty for *each* violation of OEQA and ORPFOA (see Dkt. No. 1215 ¶¶ 131, 135), they do not cite a single specific instance in which such a violation occurred at a Cargill-related field. Plaintiffs' claims fail for lack of proof.

II. The Cargill Defendants Are Entitled to Partial Summary Judgment on Plaintiffs' CERCLA Claims Alleging that They are "Owners,"[6] "Operators," and "Arrangers" (Counts 1 and 2).

"Operator." Although Plaintiffs spend a page laying out their version of the Cargill role in various aspects of turkey production (Dkt. No. 2178 at 1-2), Plaintiffs fail to accurately cite *any* evidence material to the motion's key issue: whether Cargill exercises or has any right to exercise any control or influence over Cargill Growers' disposition of the grower-owned litter. See, e.g., United States v. Bestfoods, 524 U.S. 51, 66-67 (1998) ("an operator must manage, direct, or conduct operations specifically related to pollution, that is, operations having to do with the leakage or disposal of hazardous waste, or decisions about compliance with environmental regulations.") Plaintiffs have not created an issue of fact as to operator liability.

"Arranger." Plaintiffs try to support Cargill "arranger" liability for grower fields based wholly on United States v. Aceto Agric. Chems. Corp., 872 F.2d 1373 (8th Cir. 1989). Plaintiffs make no effort to come within the controlling and much more narrow requirements set out in

[6] Plaintiffs do not dispute that neither Cargill defendant is liable as an "owner" of any Cargill Grower's fields, apparently conceding entitlement to summary judgment on that claim.

Burlington Northern & Santa Fe Ry. v. United States, 129 S. Ct. 1870 (2009) (plaintiff must prove "intentional steps to dispose of a hazardous substance").

III. The Cargill Defendants Are Entitled to Summary Judgment on Plaintiffs' Claim of Unjust Enrichment (Count 10).

Plaintiffs do not dispute that their unjust enrichment claim requires them to demonstrate the amount by which each Cargill Defendant has supposedly been enriched by not having to haul turkey litter out of the IRW, but they offer no evidence of what that amount is. Instead, Plaintiffs ask the Court to deny Cargill and CTP summary judgment based solely on Plaintiffs' assertion that the Court can make the "simple calculation" of this amount, on its own, at trial, and without expert assistance. In fact, such a calculation would *not* be simple at all; at the very least, it would need to account for the facts (for example) that many Cargill Growers do not in fact land-apply litter (see Dkt. Nos. 1552-7 ¶ 7; 2079-17 at OKDA0003042, *et. seq.*; 2203-3 at 2009 Cargill supp-00170; 2079-17 at OKDA0010084, *et. Seq.*; 2079-17 at OKDA0006322, *et. seq.*) and that CTP has for years shipped its own turkey litter out of the IRW at its own expense. See Dkt. Nos. 2200-13 at 3; 2203-6 at p. 5.

Moreover, if the calculation were indeed so simple, Plaintiffs' response presumably would have offered the Court the basis and method for and the results of such a calculation. They did not. A response to a motion for summary judgment after the close of discovery and the end of expert disclosures is not the time to make promises about future proof. Plaintiffs have failed to offer any evidence showing a genuine issue of material fact on the element of the amount of the Cargill Defendants' unjust enrichment, and the Cargill Defendants are entitled to summary judgment as to that claim. See Rule 56(e)(2) (party opposing summary judgment "may not rely merely on assertions [but] must—by affidavits or as otherwise provided in this rule—set out specific facts showing an issue for trial").

IV. PLAINTIFFS HAVE NO STANDING TO PURSUE PROSPECTIVE INJUNCTIVE RELIEF FROM CARGILL, INC.

Plaintiffs concede that Cargill, Inc. has no turkey operations in the IRW and has had no such operations since before this lawsuit began. Plaintiffs nevertheless argue that they are entitled to a prospective injunction[7] because "there would be nothing to prevent Cargill…from simply resuming the long-standing conduct." Dkt. No. 2178 at 24. This mere assertion is not sufficient. See Nova Health Sys. v. Gandy, 416 F.3d 1149, 1155 n.5 (10th Cir. 2005).

For a plaintiff to have Article III standing to pursue a claim, "it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (U.S. 1992) (quoting Simon v. Eastern Ky. Welfare Rights Organization, 426 U.S. 26, 38, 43 (1976)). In resisting Cargill's motion for summary judgment on standing, Plaintiffs must identify facts from which the Court could conclude that a prospective injunction against Cargill would "likely" redress some injury to Plaintiff. Plaintiffs offer only possibilities and fail to point to a *single* piece of evidence suggesting either that Cargill left the poultry business for reasons related to this lawsuit or that Cargill will ever return to its former operations. Plaintiffs lack standing to pursue prospective injunctive relief against Cargill, and the Court should grant Cargill's motion on this issue.

CONCLUSION

For the reasons set forth above and in the Defendants' joint motions for summary judgment, the Cargill Defendants urge the Court to grant them summary judgment.

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[7] Contrary to Plaintiffs' misimpression (see Dkt. No. 2178 at 23), Cargill does not in the present motion seek partial summary judgment on Plaintiffs' claims for retrospective injunctive relief, (i.e., orders regarding cleanup of past releases) based on lack of standing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on the 19th day of June, 2009, I electronically transmitted the attached document to the Clerk of Court using the ECF System for filing and transmittal of a Notice of Electronic Filing to the following ECF registrants:

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